74-1455

Supreme Court, U. S.
FILED
MAY 19 1975

IN THE

Supreme Court of the United States

October Term, 1975

No. ....., Misc.

JOE W. TYREE,
Petitioner,

v.

COMMISSIONER OF PATENTS,
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA, and
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA,
Respondents.

MOTION FOR LEAVE TO FILE PETITION FOP WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI

JEROME R. CRONK
Attorney for Petitioner

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CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

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MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

The petitioner moves the Court for leave to file the petition for a writ of mandamus hereto annexed; and further moves that an order and rule be entered and issued directing the Honorable The United States Court of Appeals for the District of Columbia and The United States District Court for the District of Columbia to show cause why a writ of mandamus should not be issued against them in accordance with the prayer of said petition, and why your petitioner should not have such other and further relief in the premises as may be just and meet.

Respectfully submitted,
JEROME R. CRONK

May 19, 1975.

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AMENDED PETITION FOR WRIT OF MANDAMUS, OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI

The Petitioner, Joe W. Tyree, respectfully prays as follows:

1. That a Writ of Mandamus issue from this Court directed to the Honorable United States Court of Appeals for the District of Columbia and to the Judges of said Court and to the United States District Court for the District of Columbia and to the Honorable Mathew F. McGuire, Judge of said Court, requiring said Respondents to show cause on a day to be fixed by this Court why mandamus should not issue from this Court directing said Respondents to vacate from the record the Per Curiam orders of March 14, 1974, and April 22, 1974, denying the Petitioner's Petition for

Writ of Mandamus and the District Court's order of January 30, 1974 dismissing the Petitioner's complaint;

2. That in the alternative a Writ of Certiorari issue to review the aforesaid orders;

3. That the Petitioner have such additional relief as may be necessary and appropriate in the premises.

DATED this 19th day of May, 1975.

Respectfully submitted,

JEROME R. CRONK
Counsel for Petitioner

OPINION BELOW

No opinion was rendered by either the District Court or the Court of Appeals.

JURISDICTION

The Order of the District Court for the District of Columbia dismissing the Petitioner's complaint was entered on January 30, 1974. A timely Petition for Writ of Mandamus was filed by the Petitioner pro se in the United States Court of Appeals for the District of Columbia on February 20, 1974, which Petition sought a review and reversal of the Order of the District Court. On March 14, 1974, the Court of Appeals entered its order denying the Petition for Writ of Mandamus. A timely motion to reconsider was filed by the Petitioner on March 22, 1974, and the Court issued its order denying the motion on April 22, 1974.

The Petitioner, still on a pro se basis, then made timely application for a Writ of Mandamus in the United States Supreme Court. This consisted of a document entitled "Writ of Mandamus," "Affidavit" and "Bill in Equity," was

accompanied by a $100.00 check and was received by the Clerk of the Supreme Court on or about May 10, 1974. A copy is reproduced in Appendix A hereof. On May 15, 1974, the Clerk returned the Petition and the check to the Petitioner for its purported failure to comply with the Supreme Court Rules, especially Rule 31, paragraph (3). On May 20, 1974, the Petitioner resubmitted his application for mandamus and the check for filing fee together with a copy of the District Court Order of January 30, 1974, the Court of Appeals Orders of March 14, 1974 and April 22, 1974. On May 30, 1974, the Clerk again rejected the Petitioner's application on the grounds that the Petition for Mandamus must be printed and forty copies submitted.

In compliance with this request the Petitioner forwarded forty copies of his documents to the Clerk on June 6, 1974. This effort was rebuffed by the Clerk in a letter to the Petitioner of June 13, 1974, returning the documents with the comment that they did not comply with the Court's rules of procedure or applicable statutes and that there was nothing in them that could be presented to the Court for its consideration. On June 25, 1974, the Petitioner submitted an affidavit to the Supreme Court Clerk making reference to his previous application for mandamus and requesting that his application and petition for Writ of Mandamus be submitted to the Court for filing. Hearing nothing further from the Clerk, the Petitioner submitted further affidavits of demand on July 5, and July 12, 1974, attempting to gain the Court's attention. In the meantime, on July 10, 1974, the Clerk came full circle by again returning the Petitioner's documents with a cover letter containing the exact wording of its letter to him of May 15, 1974.

Apparently stymied and baffled by his inability to get anything on the Supreme Court's docket the Petitioner turned back to the Court of Appeals and on August 7, 1974, obtained an order from Chief Judge Bazelon ordering the Clerk to transmit the certified record of proceedings in the Court of Appeals to the Supreme Court. This certified record was prepared and submitted to the Supreme Court on or about September 3, 1974. The Supreme Court Clerk in a letter dated September 11, 1974, returned the documents stating his inability to find anything on file with which these documents might be associated. The Petitioner replied that the documents should be associated with a docket number to be assigned and made reference to his petition and other papers previously sought to be filed.

The Petitioner made still another pro se attempt to docket his case in an affidavit of demand dated October 1, 1974. These papers were returned under letter of the Clerk dated October 4, 1974, for their purported failure to comply with the Court's Rules of Procedure. The Petitioner had further correspondence and phone conversations with the clerk of the Court of Appeals in continuing attempts to get the certified record submitted to the Supreme Court, which said clerks led him to believe would clear up his problems in the Supreme Court. Those efforts continued up through November 30, 1974, and that is where the matter now stands.

Thus, the record shows that the Petitioner filed his original application for mandamus well within ninety days of the entry of the Court of Appeals Order Denying Motion to Reconsider and that a continuing, diligent, good

faith effort was made thereafter to obtain the Supreme Court's review of the matter. His papers, though inartful, substantially complied with the Rules of this Court. In the present application the Petitioner for the first time is represented by counsel. This application is intended as a continuation and amendment of the application first made to this Court on May 10, 1974. The Court has allowed a writ of error to be amended to remedy a defect. Such allowance rests in the discretion of the Court. *Walton v. Marietta Chair Co.*, 157 U.S. 342 (1894). Although it may be a technicality without much substance, the Petitioner continues to seek mandamus, as this was the method initially invoked to seek review. However, the Court could very well deny mandamus and entertain the matter as a petition for certiorari in the normal course. *Reynolds v. Cochran*, 363 U.S. 801.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a motion to dismiss made under Rule 12 of the Federal Rules of Civil Procedure on the grounds the action is barred by the statute of limitations is proper and should be granted where:

a. The factual basis supporting the motion is not apparent on the face of the pleadings;

b. No factual foundation by affidavit, testimony or other evidence is presented by the moving party;

c. The opposing party disputes by affidavit the factual basis contended for by the moving party and

d. No hearing on the motion to dismiss is held?

2. Whether the filing date of a civil action is a matter of fact to be proven by normally admissible evidence at a trial or hearing.

3. In case of disputed questions relating to the filing date for the commencement of an action, what presumptions pertain?

4. What act or event constitutes "filing" of a civil action?

5. Is the sixty day statute of limitations for the commencement of an action against the Commissioner of Patents under 35 U.S.C. §145 tolled by delivering suit papers with the filing fee paid to the Clerk of the District Court for filing within the statutory period? Or, conversely, do the Clerks of the Federal District Court have the authority to postpone the commencement of an action by delaying for a time the entry of the filing date of papers delivered to them in proper form?

STATEMENT OF THE CASE

The Petitioner, Joe W. Tyree, is the inventor of a revolutionary type of rotary mechanism for fluid pumps, fluid motors and combustion engines. Patents on his invention have been issued by many countries throughout the world. The United States Commissioner of Patents allowed one portion of the claims made by Tyree in his application but disallowed the very significant remaining claims. Dissatisfied by this decision, Tyree filed an appeal with the Board of Appeals which was turned down and then a petition for rehearing which was denied. Thereafter, he sought to commence a civil action against the Commissioner of Patents in the U. S. District Court for the District of Columbia pursuant to 35 U.S.C.§145 and Rule 304 of the Rules of

Practice in Patent Cases. The Petitioner concedes for the purposes of this petition that November 9, 1973 was the last day on which Tyree's action could be filed under §145, as claimed by the Solicitor.

Tyree forwarded his pro se civil action papers to the Clerk of the U. S. District Court on or about October 18, 1973. The clerk returned them on October 29, 1973, for the claimed failure to provide the filing fee. Tyree then resubmitted his papers complete with filing fee on or about October 31, 1973 and these items were received by the Clerk of the District Court on November 5, 1973, as proven by a certified mail receipt signed by a deputy clerk of the District Court (a copy of which was furnished to the Court of Appeals and is reproduced in Appendix B hereof). However, for some unexplained reason the Clerk did not record the papers as filed until some ten days later on November 15, 1973.

On or about January 14, 1974, the Solicitor of the United States Patent Office served a motion to dismiss for lack of jurisdiction over the subject matter of the complaint. The motion was accompanied by a memorandum of Points and Authorities which argued that the action should be dismissed as barred by the statute of limitations set forth in 35 U.S.C. §145. This statute requires that an applicant dissatisfied with the decision of the Board of Appeals has a remedy by civil action against the Commissioner if commenced within such time as the Commissioner appoints. Under Rule 304 the time for commencement of an action is sixty days from the date of the decision and thirty days after decision on a petition for rehearing. The solicitor's memorandum pointed out these matters and then simply

made the unsupported and unverified assertion that, "this civil action was filed on November 15, 1973. . . ." This assertion was accompanied by no affidavit, exhibit or other evidence.

On January 18, 1974, Tyree submitted an affidavit in opposition to the solicitor's motion which referred to and had attached to it a memorandum of Points and Authorities. The memorandum, among other things, pointed out that the civil action had been filed prior to the date stated in the Solicitor's memorandum and within the prescribed period. Reference was made to a certified mail receipt which supported his claim of filing date.

Without hearing and without further deliberations as far as appears from the record the District Court granted the motion to dismiss the complaint by order of January 30, 1974.

On or about February 20, 1974 Tyree filed his pro se petition for Writ of Mandamus in the U. S. Court of Appeals for the District of Columbia. Thereafter transpired the proceedings which have previously been described.

REASONS FOR GRANTING THE WRIT

1. The Supreme Court's power of supervision should be exercised in this case to correct a serious departure from the accepted and usual course of judicial proceedings by the District Court which was sanctioned by the Court of Appeals in the following particulars:

a. The District Court granted a motion to dismiss made pursuant to Rule 12 based upon the defense of statute of limitations. There is conflicting authority as to whether the defense of statute of limitations is available on a motion to

dismiss. 61 A.L.R. 2d 300, 323 §9, 327 §11. The more persuasive authority is that Rule 12 was not intended to be used as a method for presenting statute of limitations defenses, especially in view of Rule 8(c), and especially when there are factual issues to be determined. *Mountjoy v. Twentieth Century Fox Film Corp.*, 13 F.R.D. 122 (D.C., W.D., Mo., 1952).

b. The District Court dismissed the complaint without having any admissible evidence before it from the moving party and, as a matter of fact, in the face of a controverting affidavit as to the facts which was furnished by Tyree.

> It seems to be settled that before a motion to dismiss will lie, the bar of the statute of limitations must clearly appear from the face of the complaint and that if any issues of fact are involved, the motion will be denied.
> 61 A.L.R. 2d 324 §10.

When a motion to dismiss an action as being barred by the statute of limitations is supported and oposed by affidavits, the motion should be treated as one for summary judgment under Rule 56. *McMillen v. Douglas Aircraft Company*, 90 F. Supp. 670 (D.C., S.D. Calif., C.D. 1950) and the cases cited therein. A summary judgment cannot be granted if there is any genuine issue as to a material fact. Rule 56, Federal Rules of Civil Procedure.

c. The District Court dismissed the complaint without a hearing. This practice and procedure raises grave constitutional questions of denial of due process. A split of authority on the issue is commented upon in 1 A.L.R. Fed. 295 §2[a].

d. Apparently the District Court Clerk held up the official entry of the filing of Tyree's complaint against the commissioner until after the statute of limitations had expired,

even though the Clerk had the papers and the filing fees in his possession at least ten (10) days prior to the official docketing. We do not know the reason for this delay—whether by inadvertence, misunderstanding, design, or whatever. However, this kind of practice should not be permitted to affect the substantive rights of litigants as it apparently has in this case. As was said by this Court in *Mutual Life Insurance Co. v. Phinny*, 178 U.S. 327 at 336 (1899) where a writ of error was delivered to a deputy clerk within the time allowed for an appeal but the clerk failed to endorse it as filed:

> Is it within the power of a clerk to overrule the action of the Judge, and prevent an appeal or writ of error which he has allowed? When . . . the party seeking review has done all that is required of him, can it be that the omission of a clerk (if there was such an omission) can prevent the jurisdiction attaching to the appellate court? Obviously not. "When it is deposited with the clerk, to whose judges it is directed, it is served." [citation omitted]

Filing of a complaint is commencement of an action, Rule 3, Federal Rules of Civil Procedure, and "filing" means nothing more than delivery of the complaint to an officer of the court authorized to receive it. *The Moore Co. of Sikeston v. Sid Richardson Carbon & Gasoline Co.*, 347 F.2d 921 (8th Cir. 1965); *The Washington*, 16 F.2d 206 (6th Cir. 1926); *Greeson v. Sherman*, 265 F. Supp. 340 (W.D., Va., 1967); *U.S. v. Nunley*, 369 F. Supp. 171 (E.D. Tenn. 1972); *Wagner v. New York, Ontario & Western Ry.*, 146 F Supp. 926 (D.C., Pa., 1956); 51 Am. Jur. 2d 773, *Limitations of Actions* §213.

2. The decision of the Court of Appeals, in sanctioning the District Court's dismissal under Rule 12 and without a

hearing is in conflict with decisions of the Ninth Circuit in the cases cited at 1 A.L.R. Fed. 295 §2[a] and with the decisions of a number of District Courts cited in 61 A.L.R. 2d 300, 327 §11 (previously commented upon in paragraph 1 a and b above).

3. There are also issues of significant public interest in this case.

a. One might wonder from what has happened here whether a pro se party who has acted diligently and completely in good faith can obtain justice in the Federal Court system. Mr. Tyree in all instances filed adequate documents, which if read and seriously considered by the lower courts, would have unquestionably led to a reversal of the order of dismissal and, as a matter of fact, would have obviated its entry in the first place. Mr. Tyree's treatment by the clerks and the lower courts suggest a strong bias against pro se representation.

b. Article I, §8 of the Federal Constitution furnishes strong impetus for a full, fair and favorable hearing of this matter. Our Constitution recognizes the desirability of promoting the progress of science and the useful arts by protecting and rewarding the efforts of inventors. *Connecticut Paper Products, Inc. v. New York Paper Co.*, 39 F. Supp. 127 (D.C., Md., 1941). Never have the times been more appropriate in the face of the present energy crisis and the serious challenges to our environment to give struggling, self-taught inventors the greatest amount of encouragement in their efforts to make a better world for all of us to live in.

CONCLUSION

For these reasons, a Writ of Mandamus should issue to the lower courts involved an order directing a correction of the practices and procedures which resulted in the dismissal of the Petitioner's Complaint or, in the alternative, a Writ of Certiorari should issue to review the orders of the District Court and the Court of Appeals for the District of Columbia.

Respectfully submitted,

JEROME R. CRONK
Attorney for Petitioner

May 19, 1975.

[SEAL]
(Universal Rotary Technology)

APPENDIX A

IN THE UNITED STATES SUPREME COURT

JOE W. TYREE, pro se, *Plaintiff, (Ex parte),* v. (1) COMMISSIONER OF PATENTS (2) U.S. DISTRICT COURT (3) U.S. COURT OF APPEALS *Respondents.*	Civil Action No. 2061-73 Writ of Mandamus No. 74-1313 "Affidavit" May 10, 1974

BILL IN EQUITY

(R.S. § 4915) = (35 U.S.C. § 145)

I The one issue before the U.S. Supreme Court in R.S. 4915 suit is . . . "The U.S. District Court errored in confirming respondents (1) order for lack of jurisdiction" . . . "The U.S. Court of Appeals, respondent (3) errored on two counts by not restoring jurisdiction to said court" (as requested by way of Mandamus No. 74-1313 instituted by plaintiff as his only means of justice) . . .

° ° °

II The *only defense pleaded by respondents* #1, #2, & #3, above being; "*Manifest Error*" and "Untrue Statement" that; plaintiff was six days late in instituting Civil Action #2061-73 . . . Respondents defense is "Manifestly Unconscionable" . . . *Recall judgment is respectfully requested* . . .

° ° °

III The cardinal unquestionable fact of plaintiffs rebutting evidence is . . . "Plaintiff instituted Civil Action No. 2061-73 on *October 18, 1973* by way of Registered Mail

#60071, return receipt requested . . . (return receipt was signed and dated by U.S. District Court on October 23, 1973) . . . Civil Action No. 2061-73 was therefore *instituted 22 days before the deadline* of November 9th, 1973 . . . (See Exhibit EX 1 and EX 2) . . .

• • •

IV Respondent (1) was also sent an exact copy of Civil Action No. 2061-73 on October 25, 1973 by way of Registered Mail #60130, return receipt requested . . . (return receipt was signed and dated by *United States Patent Office* on October 29, 1973) . . . Respondent (1) *was therefore informed of the fact Plaintiff had instituted Civil Action 22 days before deadline* of November 9, 1973 . . . Exact copy of Civil Action enclosed was *Notarized and dated October 18, 1973* . . . Respondent received said Civil Action No. 2061-73 in *Affidavit of plaintiffs*, 12 days before deadline stated above . . . (See Exhibit EX 3) . . . (Copy was "actually Notarized"; it was not a copy of a notarized document) . . . *Therefore being a Notarized Affidavit* . . .

• • •

V Respondent (1) was also sent a Certified Check #885 @ $100.00 for the purpose of opening a deposit account for any charges that would occur in reference to Civil Action; Certified Check #885 and instructions were enclosed in *Affidavit (Notarized)* and sent by way of Registered Mail #60376, return receipt requested on July 16, 1973 . . . (return receipt was signed and dated by Commissioner of Patents on July 18, 1973) . . . See Exhibit EX5. *Respondent* (1) was therefore *informed Civil Action was to be used as a means of justice five months before deadline* of November 9, 1973 . . . The following was

quoted in said Affidavit . . . *Quote*: "I (Plaintiff) further respectfully request, in compliance with the 60 day rule (as stated in section 145 of Patent Law "Civil Action to obtain patent") that a complaint be filed in the United States District Court; and have the Marshall serve a summons on the Commissioner of Patents (Defendant), in compliance with 35 U.S.C. 145. Please send a certified copy of the file wrapper and contents in ample time before Court date. Enclosed is a certified check; for the purpose of opening a "Deposit Account" for any charges that occur on my behalf" *end of quote* . . . Registered Affidavit #60376 also had enclosed therein; Exhibits 1X1, 2X2, and 3X3 which are the same as now on file in Civil Action No. 2061-73 . . . Affidavit of July 16, 1973 #60376 also *requested the Commissioner to waive the requirements "under Rule 183"* because of extraordinary circumstances, (See Exhibit EX6) . . . page 2 Summary of said Affidavit . . .

• • •

VI In view of above rebutting evidence, the Courts have been prejudiced by manifest error, and mislead by incompetent advice entered on behalf of respondents . . .

• • •

VII In reference to Byod v. U.S. 116 U.S. 635, 6 Supp. Ct 524, 29L. Ed. 746. It is the duty of the Court to be watchful for the Constitutional rights of the citizen, and against any stealthy encroachments thereon. There motto should be "Obsta Principiis" . . .

• • •

VIII There was error manifest in refusing to give full credence to evidence favorable to plaintiff . . .

• • •

IX In Ex parte R.S. 4915 (Bill in Equity) suits; claims must be given broadest interpretation of which they reasonably are susceptible; Hydraulic Press Corp. Inc. v. Coe, 77 App D.C. 251, 134 F. (2d) 49, 56 U.S.C.A. 437 . . .

• • •

X In reference to Plaintiffs (Joe W. Tyree) Civil Action No. 2061-73 and No. 74-1313 above; the question is *not* before the Court whether invention is present; in view of the fact; "Where one claim has been allowed, it must be conceded by Court that application discloses invention, In re Miller, 34 CCPA910, 159 F. (2d) 756, 72 USPQ 512" . . .

• • •

XI Plaintiffs rebutting evidence again enclosed herein as Exhibits EX1 thru EX6 prove beyond question Civil Action was *not* instituted 6 days late . . . Another proof being EX4 enclosed "a money order #16797381096 to the Treasure of the United States *for Civil Action U.S.C. 145 and dated October 31, 1973*, sent by Registered Mail #60175 (return receipt requested) on the same date and *received by Clerk of Court well before deadline* of November 9, 1973 . . . (See EX4-A)

• • •

XII Plaintiff was not late in instituting Civil Action No. 2061-73 under 35 U.S.C. § 145 and Rule 304 of the Rules of Practice as respondents allege . . . (Plaintiff *(Joe W. Tyree) pro se instituted Civil Action 22 days before deadline* of November 9, 1973 and further informed respondents (1) fully of all facts thereto five months before deadline . . .

XIII Motion for "Recall Judgment" and motion for "Order" drafted by plaintiff and contained herein should be granted . . .

• • •

MOTION TO ISSUE

I Plaintiff Joe W. Tyree (pro se) moves for "Obsta Principiis" . . .

• • •

II Plaintiff moves that judgment "Non Obstante Verdicto" be given and claims 1 thru 17 as a whole be passed to issue, as non-obvious to the prior art or one with ordinary skills in the art at the time the discovery was made; in reference to above entitled Civil Action No. 2061-73 and No. 74-1313 . . .

• • •

III Plaintiff moves for "Peremptory Mandamus" in reference to above writ of mandamus No. 74-1313 . . .

• • •

IV Plaintiff moves for "Recall Judgment" being the plain unequivocal legal duty of respondents to perform the requested act (demanded by plaintiff) without discretion to refuse, thus being a minsteral act in general, (in view of the unquestionable rebutting evidence thus far disclosed, claimed and inherent (U.S. Const. Art. 1 Sec. 8) . . .

• • •

V Plaintiff moves evidence be considered *as a whole* (reference to Exhibits 1X1, 2X2, & 3X3 now on file and Exhibits EX1 thru EX6 enclosed etc.) and the truth ascertained, (as in other cases of contradictory evidence) the tribunal charged with the ascertainment of facts is bound to determine the inherent evidential value of each

piece of plaintiff's rebutting evidence and weigh it with the inferences and probabilities arising from all the circumstances, and thus reach a just decision . . .

• • •

VI Plaintiff moves for Summary judgment . . .

• • •

VII Plaintiff moves for Order of jury trial, (if order contained herein is not accepted and passed to issue as a whole in favor of plaintiff) as to claims 1 thru 17 being non-obvious to the prior art or one with ordinary skills in the art at the time discovery was made . . . (See Order enclosed, dated May 10, 1974)

Thank You in Advance,

Respectfully submitted,

/s/ JOE W. TYREE

JOE W. TYREE

JWT/sdt

Enclosures: (1) filing fee, (2) Exhibits EX1 thru EX6, (3) ORDER*

[SEAL]

STATE OF WASH. }
County of King } ss.

On this 10th day of May, A.D. 1974, before me the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn personally appeared Joe W. Tyree to me known to be the individual described in and who executed the foregoing instrument, and acknowledged to me that he signed and sealed the said instrument as his free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal hereto affixed the day and year in this certificate above written.

/s/ L. SMITH
L. SMITH

Notary Public in and for the State of Wash.
residing at Seattle.

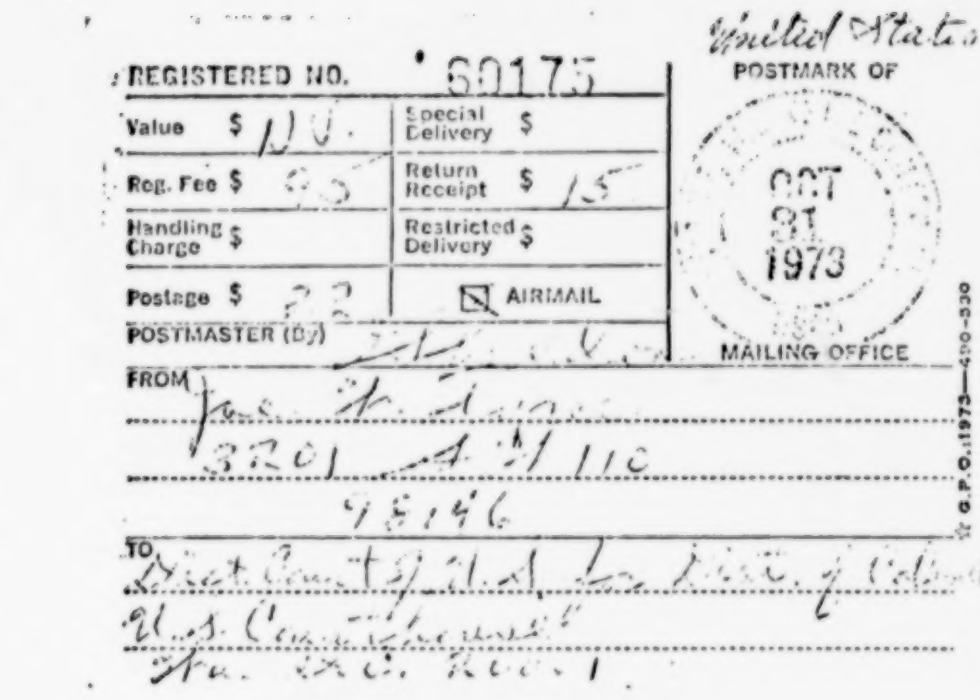
[SEAL]

P.S.

I hereby certify that copies of the foregoing were mailed today by Registered Air Mail to (1) Commissioner of Patents, (2) U.S. District Court, (3) U.S. Court of Appeals, District of Columbia, and U.S. Attorney General. (U.S. Attorney General (4) was served summons in original Civil Action No. 2061-73).

*Copies of enclosures omitted from this Appendix

APPENDIX B



United States

REGISTERED NO. 60175

POSTMARK OF

Value $ 10.	Special Delivery $
Reg. Fee $ .80	Return Receipt $ .15
Handling Charge $	Restricted Delivery $
Postage $ .25	☒ AIRMAIL
POSTMASTER (By)	

OCT 31 1973

MAILING OFFICE

FROM

TO

SENDER: Be sure to follow instructions on other side

PLEASE FURNISH SERVICE(S) INDICATED BY CHECKED BLOCK(S)
(Additional charges required for these services)

☐ Show address where delivered

☐ Deliver ONLY to addressee

RECEIPT

Received the numbered article described below

REGISTERED NO. 60175

CERTIFIED NO.

INSURED NO.

DATE DELIVERED

SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

DATE DELIVERED (Only if requested and extra fee paid)

NOV 5 1973

BEST COPY AVAILABLE

74-1455

Supreme Court, U. S.
FILED
MAY 19 1975
MICHAEL RODAK, JR., CLERK

IN THE

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MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI

SUPPLEMENTAL APPENDIX
(APPENDIX C)

JEROME R. CRONK
Attorney for Petitioner

Office and Post Office Address:
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Seattle, Wa. 98164

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOE W. TYREE, *Plaintiff*, v. COMMISSIONER OF PATENTS, *Defendant*.	CIVIL ACTION No. 2061-73

FILED
JAN. 30, 1974
JAMES F. DAVEY, Clerk

ORDER

Upon consideration of defendant's MOTION TO DISMISS, it is this 30th day of January, 1974,

ORDERED that said MOTION be and it is hereby granted and that the complaint be and it is hereby dismissed.

/s/ MATHEW F. MCGUIRE
Judge

A TRUE COPY
JAMES E. DAVEY, *Clerk*

By Margaret T. Vandevier
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
September Term, 1973
No. 74-1313

JOE W. TYREE, *Petitioner,* v. COMMISSIONER OF PATENTS and DISTRICT COURT, *Respondents.*	CIVIL ACTION No. 2061-73 FILED MAR. 14, 1974 HUGH E. KLINE, Clerk

Before: Bastian, Senior Circuit Judge, and Wilkey, Circuit Judge.

ORDER

On consideration of petitioner's petition for writ of mandamus, it is

ORDERED by the Court that petitioner's petition for writ of mandamus is denied.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1973
No. 74-1313

JOE W. TYREE, *Petitioner,* v. COMMISSIONER OF PATENTS and DISTRICT COURT, *Respondents.*	CIVIL ACTION No. 2061-73 FILED APR. 22, 1974 HUGH E. KLINE, Clerk

Before Bastian, Senior Circuit Judge and Wilkey, Circuit Judge

ORDER

On consideration of petitioner's *pro se* motion for reconsideration of this Court's order of March 14, 1974, it is

ORDERED by the Court that the aforesaid motion for reconsideration is denied. *See 35 U.S.C. § 149* and *Rule 304 of the Rules of Practice in Patent Cases.*

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1973

No. 74-1313

JOE W. TYREE, *Petitioner,* v. COMMISSIONER OF PATENTS and DISTRICT COURT, *Respondents.*	CIVIL ACTION No. 2061-73

FILED
AUG. 7, 1974
HUGH E. KLINE, Clerk

Before: Bazelon, Chief Judge

ORDER

On consideration of petitioner's *pro se* motion requesting that the certified record and the proceedings in this Court be transmitted to the Clerk, Supreme Court, it is

ORDERED that the Clerk is directed to prepare, upon receipt of the appropriate fee, a record consisting of the following:

1. *Per Curiam* order denying petitioner's petition for writ of mandamus, filed March 14, 1974.
2. Petitioner's *pro se* motion for reconsideration, filed April 8, 1974.
3. *Per Curiam* order denying motion for reconsideration, filed April 22, 1974.

IT IS FURTHER ORDERED that the Clerk is directed to transmit the certified record of this Court to the Supreme Court.

No. 74-1455

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOE W. TYREE, PETITIONER

v.

COMMISSIONER OF PATENTS, ET AL.

ON PETITION FOR A WRIT OF MANDAMUS OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1455

JOE W. TYREE, PETITIONER

v.

COMMISSIONER OF PATENTS, ET AL.

ON PETITION FOR A WRIT OF MANDAMUS OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner seeks a writ of mandamus to review a March 14, 1974, *per curiam* order of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. C, p. A-2) that denied his petition for a writ of mandamus to review a district court order dismissing his complaint as barred by the applicable statute of limitations.

Petitioner filed an application for a patent on a rotary mechanism device for fluid pumps, fluid motors, and combustion engines. The Commissioner of Patents allowed one of the claims in the application but rejected the remaining claims, and the Board of Patent Appeals sustained that action. Petitioner then filed suit for review in the United States District Court for the District of Columbia.

Petitioner concedes (Pet. 8) that November 9, 1973 was the last day his suit could have been timely filed under 35 U.S.C. 145. The district court's docket entries and the date stamped on petitioner's complaint by the district court clerk show that it was not filed until November 15, 1973. Accordingly, the district court granted the government's motion to dismiss the complaint as barred by the statute of limitations (Pet. App. C, p. A-1).[1]

Although the dismissal order was appealable, petitioner did not file a notice of appeal but chose instead to file a petition for a writ of mandamus in the court of appeals. Mandamus is an extraordinary remedy that is not to be used as a substitute for appeal (*Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 383; *Ex parte Fahey*, 332 U.S. 258, 260), and the court of appeals properly denied relief.

The same considerations that underlie the court of appeals' order are equally applicable to petitioner's request for mandamus relief in this Court. It is unclear whether petitioner's request for mandamus relief seeks direct review of the district court's dismissal of his complaint, or review of the court of appeals' denial of his petition for mandamus, or both. But it is clear that each of the courts below was acting within its prescribed jurisdiction and that

[1]Petitioner, relying on a registered mail receipt (Pet. App. B), contends that his complaint was received by the district court on November 5, 1973, four days before the expiration of the limitation period. Since this contention was before the district court (Pet. 9), presumably it was considered and rejected. Had petitioner believed the dismissal to be the result of oversight or mistake, he could have filed a motion to vacate the order under Rule 60(b), Fed. R. Civ. P., at any time within one year of entry of the order, but he failed to do so.

there are no exceptional circumstances here warranting the unusual relief provided by the extraordinary writ of mandamus. As this Court stated in *Will* v. *United States*, 389 U.S. 90, 95:

> The peremptory writ of mandamus has traditionally been used in the federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." * * * While the courts have never confined themselves to an arbitrary and technical definition of "jurisdiction," it is clear that only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy.

Petitioner's contentions here, all of which are bottomed upon the district court's alleged error in finding petitioner's complaint untimely, fail to establish any judicial usurpation of power.

If the petition is treated as one for a writ of certiorari (*e.g.*, *In re Shuttlesworth*, 369 U.S. 35), it is untimely. The order of the court of appeals was entered on March 14, 1974, and rehearing was denied on April 22, 1974 (Pet. App. C, p. A-3). Accordingly, the 90-day period prescribed by 28 U.S.C. 2101(c) within which to file a petition for a writ of certiorari

expired on July 21, 1974.[2] The instant petition was not filed until May 19, 1975.[3] The time limitations of 28 U.S.C. 2101(c) are jurisdictional. *Toledo Co.* v. *Computing Co.*, 261 U.S. 399, 418.

It is therefore respectfully submitted that the motion for leave to file a petition for a writ of mandamus, and the petition for a writ of certiorari, should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

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[2]Petitioner did not obtain an extension of the time for filing a petition for a writ of certiorari.

[3]Petitioner asserts (Pet. 6) that the instant petition amends his initial application to this Court, filed May 10, 1974, and is thus timely. However, petitioner's prior application to this Court had been returned by the Clerk for failure to comply with the applicable Rules of this Court. There was thus no timely filing to which the present petition could relate.

But even if the petition is deemed timely, it should be denied, for, as we have shown above (pp. 2-3, *supra*), the denial of mandamus below was proper and this case presents no issue warranting exercise by this Court of its discretionary jurisdiction.

DOJ-1975-07